DISSENTING VIEWS

The problems with H.J. Res. 41, like past versions of the constitutional amendment,[1] are myriad and obvious: most fundamentally, it undercuts the very principle our nation was founded upon—majority rule. By requiring a supermajority to pass certain legislation, the amendment would diminish the vote of every Member of the House and Senate, nullifying the seminal democratic concept of "one person, one vote."

Moreover, the amendment would make it nearly impossible to eliminate corporate tax welfare or even to increase tax enforcement against foreign corporations. Furthermore, the amendment could make it difficult to maintain a balanced budget or to develop a responsible plan to restore Medicare or Social Security to long-term financial solvency. Such an amendment would endanger the reauthorization of excise taxes and related fees that support important programs such as Superfund, highway construction, and air safety. Also, the amendment is vague in that there is no definition of "internal revenue laws" or "de minimis amount." It is for these reasons that groups concerned about good government and budget policy, such as Common Cause,[2] The Concord Coalition,[3] Center on Budget and Policy Priorities,[4] Citizens for Tax Justice,[5] the AFL-CIO,[6] and AFSCME,[7] oppose the type of tax limitation constitutional amendment that the Majority is pursuing. For these and the reasons set forth below, we dissent from H.J. Res. 41.

I. THE AMENDMENT DISREGARDS THE CONSTITUTIONAL PRINCIPLE OF MAJORITY RULE

The framers of the Constitution wisely rejected the principle of requiring a supermajority for basic government functions.[8] James

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[1] Every year during tax season beginning in 1996, the Majority proposes a constitutional amendment to require a two-thirds vote in the House and Senate for any legislation that increases revenues. In 2000, H.J. Res. 94 was taken straight to the floor and failed by a vote of 234–192. In 1999, H.J. Res. 37 was taken straight to the floor and failed by a vote of 229–199. In 1998, H.J. Res. 111 was taken straight to the floor and failed by a vote of 238–186. In 1997, H.J. Res. 62 passed the Committee by a vote of 18–10 but failed in the full House by a vote of 233–190. In 1996, H.J. Res. 159 was taken straight to the floor and failed by a vote of 243–177.

[2] Letter from Scott Harshberger, President, Common Cause, to Representatives, U.S. Congress (Apr. 4, 2001) [hereinafter *Common Cause Letter*].

[3] Letter from Robert L. Bixby, Executive Director, The Concord Coalition, to Representatives, U.S. Congress (Apr. 2, 2001) [hereinafter *Concord Coalition Letter*].

[4] ROBERT GREENSTEIN, CENTER ON BUDGET AND POLICY PRIORITIES, THE CONSTITUTIONAL AMENDMENT TO REQUIRE A TWO-THIRDS SUPERMAJORITY TO RAISE TAXES (Apr. 10, 2001) [hereinafter Greenstein Report].

[5] Letter from Robert S. McIntyre, Director, Citizens for Tax Justice, to Representatives, U.S. Congress (Apr. 11, 2000) [hereinafter *CTJ Letter*].

[6] Letter from Peggy Taylor, Dep't of Legislation, AFL-CIO, to Representatives, U.S. Congress (Apr. 11, 2000) [hereinafter *AFL-CIO Letter*].

[7] Letter from Charles M. Loveless, Director of Legislation, AFSCME, to Representatives, U.S. Congress (Apr. 10, 2000) [hereinafter *AFSCME Letter*].

[8] It is significant to note that, because of population patterns, Senators representing some 7.3% of the population could prevent a bill from obtaining a two-thirds majority. See U.S. CEN-

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Madison vehemently argued against supermajorities, stating that, under such a requirement, "the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority."[9]

Adopting a supermajority tax requirement would repeat the very mistakes made in the 1780's under the Articles of Confederation, which required a vote of nine of the thirteen States to raise revenue. It is because this system worked so poorly that the founding fathers sought to fashion a national government that could operate through majority rule.[10]

Supporters of a tax limitation amendment have sought to justify the departure from majority rule by pointing to other provisions in the Constitution that require a two-thirds vote, such as approving a treaty or obtaining a conviction in a congressional impeachment trial.[11] This argument, however, overlooks the fact that none of these supermajority requirements pertains to the day-to-day operations of the government—limiting such congressional authority is an invitation to gridlock.

Supporters of the measure also claim that, because fourteen States have adopted some form of a supermajority vote requirement for tax increases, the Federal Government also should have one. This argument bears little relation to the current debate. First, it is inappropriate to compare a State's revenue needs with the more comprehensive obligations of the Federal Government (such as economic policy and disaster assistance). In addition, many of the State requirements apply to particular types of taxes and do not apply to all or even the principal means of raising State tax revenue. For example, Florida's supermajority requirement applies only to corporate income taxes; exempt from the requirement is the sales tax on the purchase of goods—the primary source of the State's revenues.[12]

SUS BUREAU, U.S. DEP'T OF COMMERCE, 1996 POPULATION ESTIMATES (Dec. 30, 1996) (Press Release CB-96–244).

[9] *The Federalist Paper* No. 58, at 393 (James Madison) (The Belknap Press of Harvard University, 1961); see also *Common Cause Letter* at 1. At a Constitution Subcommittee hearing during the 104th Congress, Rep. Henry J. Hyde (R-IL), Chair of the House Committee on the Judiciary, echoed this concern:

> I am troubled by the concept of divesting a Member of the full import or his or her vote. You are diluting the vote of Members by requiring a supermajority of them to do something as basic to government as acquire the revenue to run government. It is a diminution. It is a disparagement. It is a reduction of the impact, the import, of one man, one vote.

Proposing An Amendment to the Constitution of the United States to Require Two-Thirds Majorities for Bills Increasing Taxes: Hearing on H.J. Res. 159 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 107 (1996).

[10] *Proposing An Amendment to the Constitution with Respect to Tax Limitations on H. J. Res. 62 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 1st Sess. (1997) [hereinafter *1997 Judiciary Committee Hearing*] (statement of Robert Greenstein, Executive Director, Center on Budget and Policy Priorities).

[11] There are eleven matters for which a supermajority vote is required under the Constitution: Art. I, § 2, cl. 2 (ratification of a treaty); Art. I, § 3, cl. 6 (conviction in impeachment trials); Art. I, § 5, cl. 2 (expulsion of a Member of Congress); Art. 1, § 7, cl. 2 (override a Presidential veto); Art. II, § 1, cl. 3 (quorum of two-thirds of the States to elect the President); Art. II, § 2, cl. 2 (consent to a treaty); Art. V (proposing constitutional amendments); Art VII (State ratification of the original Constitution); amendment XII (quorum of two-thirds of the States to elect the President and the Vice President); amendment XIV, § 3 (to remove disability); and amendment XXV, § 4 (removal of President for disability).

[12] See 26 Fla. Stat. Ann. V. § 1(e) (West 1970). As Rep. Bobby Scott (D-VA) noted during the Committee's markup debate, California acts simultaneously on taxes and spending cuts through the annual budget process, which considerably diminishes the supermajority's impact on tax increases because both spending increases and tax increases are subject to the same supermajority requirement. It is also important to note that total tax receipts collected by the Federal, State,

In addition, arguments by proponents that seven States that have had a supermajority tax requirement[13] have enjoyed more rapid economic growth also are misleading.[14] A study by the Center on Budget and Policy Priorities found that such analysis was "simplistic" and "flawed."[15] This study found that, by some measures, supermajority States had lower economic growth and more tax increases than other States.[16] For example, between 1979 and 1989, four of the seven States had lower than average economic growth as measured by State gross domestic product; five of the seven States experienced lower than average growth when measured by changes in per capita income; and six of the seven States had higher than average increases in State and local revenues as a percentage of residents' income.[17] Obviously, there are many factors that impact State growth other than supermajority tax requirements, including a State's educational system and the skill of its workforce.

II. THE AMENDMENT WOULD MAKE IT DIFFICULT TO CLOSE TAX LOOPHOLES

In addition, H.J. Res. 41 will make it nearly impossible to eliminate tax loopholes, thereby locking in the current tax system at the time of ratification. As Dean Samuel Thompson, one of the nation's leading tax law authorities, observed at a 1997 House Judiciary Subcommittee hearing on the proposal:

> The core problem with this proposed Constitutional amendment is that it would give special interest groups the upper hand in the tax legislative process. Once a group of taxpayers receives either a planned or unplanned tax benefit with a simple majority vote of both Houses of Congress, the group will then be able to preserve the tax benefit with just a 34% vote of one House of Congress.[18]

The potential revenue loss to the Treasury Department from such loopholes is staggering. A Congressional Budget Office study found that over half of the corporate subsidies the Federal Government provides are delivered through "tax expenditures."[19] Such ex-

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and local governments (as a percentage of gross domestic product) in the United States (30.8% in 2000)—is lower than almost all of the other major industrialized countries (Japan: 30.5%; Germany: 45.6%; France: 49.8%; Italy: 45.9%; United Kingdom: 40.3%; Canada: 42.5%). See GREGG A. ESENWEIN, CONGRESSIONAL RESEARCH SERVICE, U.S. LIBRARY OF CONGRESS, THE U.S. FISCAL POSITION COMPARED TO SELECTED INDUSTRIAL NATIONS, (CRS Report RL30560, May 19, 2000). Moreover, Federal tax revenue, as a percentage of gross domestic product, was 20% in 1999 and has remained near that level since 1960. See GREGG A. ESENWEIN, CONGRESSIONAL RESEARCH SERVICE, U.S. LIBRARY OF CONGRESS, RECENT TRENDS IN THE FEDERAL TAX BURDEN (CRS Report RS20059, Mar. 27, 2000).

[13] Arkansas, California, Delaware, Florida, Louisiana, Mississippi, and South Dakota.

[14] See *1997 Judiciary Committee Hearing* (statement of Daniel J. Mitchell, The Heritage Foundation).

[15] IRIS J. LAV & NICHOLAS JOHNSON, CENTER ON BUDGET AND POLICY PRIORITIES, DO STATES WITH SUPERMAJORITIES HAVE SMALLER TAX INCREASES OR FASTER ECONOMIC GROWTH THAN OTHER STATES? (Apr. 10, 1997).

[16] *Id.* at 1.

[17] *Id.* at 1–2.

[18] *1997 Judiciary Committee Hearing* (statement of Samuel Thompson, Dean, University of Miami School of Law).

[19] CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE UNITED STATES, FEDERAL FINANCIAL SUPPORT OF BUSINESS (July 1995). "Tax expenditures" are provisions of the tax code that selectively reduce the tax liability of particular individuals or businesses. See also OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT FOR FISCAL YEAR 2002 61 (Apr. 9, 2001).

penditures were estimated to cost the Federal Government $455 billion in fiscal year 1996 alone—triple the deficit at the time, and a full two-and-one-half times as much as all means-tested entitlement programs combined.[20]

In this regard, a 2001 study by the Institute on Taxation and Economic Policy shows that corporate tax breaks permitted at least forty-one companies to pay less than zero dollars in taxes in at least 1 year between 1996 and 1998—these companies actually got tax rebates totaling $3.2 billion from the Federal Government.[21] Eleven of these companies actually had negative Federal tax rates every year from 1996 to 1998.[22] Not surprisingly, the industry enjoying the lowest tax rates during this 3-year period was the oil industry.[23]

Furthermore, these loopholes affect State governments as well as the Federal Government. The same study by the Institute on Taxation and Economic Policy states that:

> The loopholes that reduce Federal corporate income taxes cut State corporate income taxes, too, since State corporate tax systems generally take Federal taxable income as their starting point in computing taxable corporate profits. . . . It's a mathematical truism that low and declining State revenues from corporate income taxes means higher State taxes on other State taxpayers or diminished State and local public services.[24]

In addition, the tax limitation amendment would make it exceedingly difficult to make foreign corporations pay their fare share of taxes on income earned in this country. Congress would even be limited from changing the law to increase penalties against foreign multinationals who avoid U.S. taxes by claiming that profits earned in the United States were realized in offshore tax havens. Estimates of the costs of such tax dodges are also significant; a 1992 Internal Revenue Service study estimated that foreign corporations misreported information on their tax returns at a cost of $30 billion per year.[25]

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[20] CITIZENS FOR TAX JUSTICE, THE HIDDEN ENTITLEMENTS (May 1996). According to Internal Revenue Service documents, drastic staff reductions have prevented it from pursuing individuals whose failure to pay taxes cost the Federal Government approximately $2.5 billion in 2000. David Cay Johnston, *A Smaller IRS Gives up on Billions in Back Taxes*, N.Y. Times, Apr. 13, 2001, at A1; see also *The Cost of Ignoring Tax Evasion*, N.Y. Times, Apr. 16, 2001. Those documents show that, since 1992, IRS audits have fallen by two-thirds because the agency's staff has fallen from 115,000 to 97,000 in 8 years.

[21] INSTITUTE ON TAXATION AND ECONOMIC POLICY, CORPORATE INCOME TAXES IN THE 1990'S 2 (2001) [hereinafter *ITEP Report*]. For example, Lyondell Chemical had 1998 profits of $80 million, but its tax was negative $44 million (tax rate of negative 55%); Texaco had 1998 profits of $182 million, but its tax was negative $67.7 million (tax rate of negative 37.2%); and Chevron had 1998 profits of $708 million, but its tax was negative $186.8 million (tax rate of negative 26.4%).

[22] *Id.* For example, Goodyear's average tax rate for the years 1996 to 1998 was negative 9.9%, Texaco's was negative 8.8%, and Ryder's was negative 6.2%.

[23] *Id.* at 4.

[24] *Id.* at 11.

[25] The IRS also found that on average, foreign companies report only 40% of what comparable American companies reported in taxes. See *Department of the Treasury's Report on Issues Related to the compliance with U.S. Tax Laws By Foreign Firms Operating in the United States: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.* 102d Cong., 2d Sess. 7 (1992) [hereinafter *1992 Ways and Means Committee Hearing*] (statement of Rep. Pickle, Chairman, Subcommittee on Oversight).

The problem is particularly acute in the automobile and electronics industries. For example, of foreign automotive company tax returns reviewed in a congressional study, 28% showed no taxes due, even though these firms reported sales of nearly $27 billion. One foreign auto company had $3.4 billion in sales over 2 years and paid no taxes. Of the foreign electronics companies reviewed in the study, 40% paid no U.S. income tax whatsoever, though they reported sales

Furthermore, adoption of H.J. Res. 41 would make it even more onerous than it already is to repeal or limit statutorily-permitted foreign tax credits or deferrals of taxes on unrepatriated foreign profits.[26] Estimates regarding how much the deferral provision costs U.S. taxpayers easily reach into the billions.[27] Congress's Joint Committee on Taxation predicted that the loophole would cost $800 million in 2001, while the Treasury Department found the total to be $1.4 billion.[28] Furthermore, a Congressional Budget Office forecast expects taxpayers to lose $3.8 billion per year by 2011, while the publication *Tax Notes* estimated the loss to be $10 billion per year.[29]

Not only do these loopholes cost individual taxpayers desperately-needed funds—they cost our workers jobs.[30] While in the past U.S. companies have laid off workers in the United States to cut costs, they have hired additional workers overseas to take advantage of tax provisions requiring the payment of taxes on foreign profits only if those profits are repatriated to the United States.

In rejecting these arguments, the Majority has attempted to argue that, under a tax limitation amendment, a two-thirds majority would not necessarily be required if the elimination of the loophole was linked to other tax cuts so that the overall bill was revenue neutral.[31] Although it is not entirely clear the amendment would operate in such a fashion,[32] even if it did, this interpretation would prevent using the funds raised from the elimination of such loopholes for any reason other than providing for tax cuts. For example, such revenues could not be used for debt reduction, disaster assistance, education, Medicare, or Social Security. There is simply no legitimate policy reason to link a bill raising taxes on foreign

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of almost $30 billion. One electronics firm sold $2.4 billion of products over 8 years and paid no taxes. Another company had sales of more than $9.4 billion in the United States and paid $156 in taxes. *Id.*

[26] The foreign tax credit allows U.S.-based multinational corporations to reduce their taxes in this country by one dollar for every dollar of taxes they pay overseas. 26 U.S.C. §§ 27, 33. This favorable treatment contrasts sharply with the treatment of nearly every other business expense—whether it be wages or taxes paid to State or local governments here in the United States. The foreign deferral provision, vehemently opposed by the Clinton Treasury Department, allows U.S. corporations to pay no income taxes on the profits of their foreign subsidiaries unless and until such profits are remitted to the U.S. parent. 26 U.S.C. §§ 11(d), 882, 901, 951. If profits are never paid as dividends to the parent, taxes never become due in the United States, amounting to an interest-free loan from U.S. taxpayers.

[27] Sam Loewenberg, *Business Eyes Tax Break on Foreign Profit*, LEGAL TIMES, Feb. 26, 2001, at 1.

[28] *Id.*

[29] *Id.*

[30] See *AFL-CIO Letter*. Since 1979, we have lost almost 3 million manufacturing jobs in this country. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT EMPLOYMENT STATISTICS PROGRAM (Apr. 4, 1997). During the economic downturn of the mid-1990's, we lost 26,000 manufacturing jobs per month—the equivalent of shutting down one Fortune 500 company every 30 days. *Id.* At the same time, the number of overseas jobs with U.S.-based manufacturing companies skyrocketed. For example, there are nearly 40,000 foreign workers working for U.S. corporations in Singapore alone. The Wall Street Journal has reported in the past that nearly half of the export jobs in China are linked to U.S.- and other multinational-based companies. See Joseph Kahn, *Foreigners Help Build China's Trade Surplus*, Wall St. J., Apr. 7, 1997, at A1.

[31] H.R. Rep. No. 50, 105th Cong., 1st Sess. 7–8 (1997) (House Committee on the Judiciary report on H.J. Res. 62).

[32] *1997 Judiciary Committee Hearing* ("It is not clear from the text of H.J. Res. 62 [a prior tax limitation amendment] whether . . . it would only apply to a bill that leads on an overall basis to an increase in tax.") (statement of Dean Thompson).

corporations or eliminating abusive loopholes with any additional Federal tax changes.[33]

Incredibly, under the Majority's proposal, even measures that raised revenue by improving tax enforcement would require a two-thirds majority vote.[34] As a result, new anti-fraud provisions or even a program of stepped-up enforcement against foreign multinationals who avoid U.S. taxes would be subject to a supermajority requirement.

III. THE AMENDMENT COULD LEAD TO LARGE CUTS IN SOCIAL SECURITY AND MEDICARE AND A RETURN TO DEFICIT SPENDING

In addition, H.J. Res. 41 could lead to large reductions in Social Security and Medicare benefits. As the *Washington Post* previously noted:

> When the baby boomers begin to retire not that many years from now, the country will be in an era of constant fiscal strain. To avoid destructive deficits, there will have to be tax increases and/or spending cuts. By making it harder to increase taxes, the amendment would compound the pressure on the major spending programs: Social Security, Medicare, Medicaid and the rest. Is that what Congress really wants to do? The pressure on those programs is great enough as it is.[35]

Democratic Members offered an amendment to ensure that measures designed to secure the financial solvency of Social Security would not be subject to the supermajority requirement, but the Majority defeated it on a party-line vote of 8–16.[36]

Also, the proposed tax limitation would rule out measures to raise Medicare premiums for higher income individuals' as well as modest measures to shore up Social Security and Medicare.[37] For example, if Congress attempted to make Social Security payroll taxes more progressive, such as by imposing higher tax rates on higher-income individuals, there would be an increase in the revenue laws and the supermajority requirement would be triggered.[38] Indeed, when the Republican budget reconciliation bill reached the

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[33] MARKUP OF H.J. RES. 41, HOUSE COMM. ON THE JUDICIARY, 107th Cong., 1st Sess. (2001) [hereinafter *H.J. Res. 41 Markup*]. Unfortunately, the Majority rejected by voice vote an amendment offered by Rep. Jerrold Nadler (D-NY) to exclude from the supermajority requirement any measures that closed corporate tax loopholes. The amendment added at the end of the resolution the following: "The requirements of this article do not apply to any bill, resolution, or other legislative measure repealing or reducing any industry-specific exemptions, deductions, or credits."

[34] Rep. Nadler offered an amendment that would have exempted from the provisions of the tax limitation amendment any measures designed to improve revenue enforcement, but the Majority rejected it on a voice vote. *Id.* The amendment added at the end of the resolution the following: "The requirements of this article do not apply to any bill, resolution, or other legislative measure designed to improve enforcement of the internal revenue laws."

[35] *Show Vote on Tax Day*, Wash. Post, Apr. 9, 1997, at A20 (editorial).

[36] *H.J. Res. 41 Markup.* Rep. Barney Frank (D-MA) offered an amendment that added at the end of the resolution the following: "The requirements of this article do not apply to any bill, resolution, or other legislative measure necessary to preserve the solvency of the Federal Old Age and Survivors Insurance Trust Fund."

[37] Unfortunately, the tax burden in recent years has fallen mainly on income and Medicare and Social Security payroll taxes. *ITEP Report* at 10 ("In fiscal years 1997–99, personal income tax payments grew by 28 percent and Social Security and Medicare payroll taxes on wages grew by 22 percent. But corporate income tax payments went up by a total of only 8 percent over the 3 years, and actually fell from fiscal 1998 to fiscal 1999.").

[38] Payroll taxes for Social Security are capped for the year 2001 to the first $80,400 of income and are imposed on all taxpayers at the same rate. DAVID KOITZ, U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE REPORT: SOCIAL SECURITY AND MEDICARE PREMIUMS—A FACT SHEET (CRS Report 94–28 EPW, Jan. 4, 2001). The effect of this is that lower-income taxpayers pay a higher percentage of their salaries for Social Security.

House floor in the fall of 1995, it became clear that its proposed increase in Medicare premiums for those at higher income levels constituted a tax increase.

Similarly, legislation expanding Social Security to include State and local government employees—which the Advisory Council for Social Security has proposed—would result in a revenue increase and would therefore be subject to the two-thirds requirement.[39]

Another dangerous byproduct of H.J. Res. 41 could be a return to deficit spending. As the Center on Budget and Policy Priorities testified:

> The amendment would make it virtually impossible to amass the two-thirds majority required to pass large deficit reduction packages that include both reductions in Federal programs and measures to raise revenue. As a result, the amendment would erect serious new barriers to long-term deficit reduction.[40]

It is for these reasons that the nation's perhaps most credible advocate of deficit reduction—the bipartisan Concord Coalition—strongly opposes a supermajority tax requirement. In its view, "enactment of [a tax limitation] constitutional amendment would unduly complicate the budget process. . . . No area of the budget—on either the spending or the revenue side—should receive preferential treatment such as requiring supermajority votes."[41]

IV. THE AMENDMENT WILL ENDANGER EXCISE TAXES THAT FUND PUBLIC SAFETY AND ENVIRONMENTAL PROGRAMS.

Another problem with this tax limitation amendment is that there are many important public safety programs funded by excise taxes whose extension would be subject to a supermajority vote. Many such excise taxes are dedicated to purposes such as transportation trust funds, Superfund, and compensation for health damages.[42] H.J. Res. 41 would apply to excise taxes on alcohol, tobacco, and pensions, as well as a variety of environmental taxes.[43]

Former White House Counsel Lloyd Cutler explained the difficulties a supermajority tax requirement could cause in the context of extending such taxes:

> Today a simple majority of the Senate and House could restore the [expired airline ticket tax]. . . . But under the proposed amendment, it would take 67 of the 100 senators and 290 of the 435 congressmen to restore this tax which, having expired

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[39] See *Greenstein Report*.

[40] *1997 Judiciary Committee Hearing* (statement of Robert Greenstein). Between 1982 and 1993, five pieces of legislation that raise significant revenue were enacted. The Tax Equity and Fiscal Responsibility Act of 1982, passed the House by a vote of 226–207. The 1987 Social Security rescue plan was passed by a vote of 282–148. The Omnibus Budget Reconciliation Act of 1987, a product of bipartisan negotiations that contained both spending cuts and revenue increases, passed by a vote of 237–181, and the Omnibus Budget Reconciliation Act of 1993 passed by a slender vote of 218–216.

[41] *Concord Coalition Letter* at 1.

[42] See JAMES V. SATURO & LOUIS ALAN TALLEY, U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE REPORT: TAX LIMITATIONS PROPOSALS—AN ASSESSMENT OF THE ISSUES AND OPTIONS TOGETHER WITH THE MAJOR TAX ACTS, VOTES, AND REVENUE EFFECTS (CRS Report 97–372 E, March 20, 1997); see also *1997 Judiciary Committee Hearing* (statement of Rep. Charles Rangel (D-NY), Ranking Member, House Comm. on Ways and Means).

[43] See generally 26 U.S.C. Chapters 31–47, 51–54.

on December 31, 1995, would clearly be a "new" tax covered by the amendment.[44]

In an effort to carve-out at least one important program from the onerous supermajority requirement, Democratic Members offered an amendment that would have excluded from the supermajority requirement any measures that imposed environmental taxes; again, the Majority rejected it.[45]

V. THE AMENDMENT IS VAGUE AND COULD TRANSFER SIGNIFICANT AUTHORITY TO THE COURTS

H.J. Res. 41 will present a variety of new and complex interpretational difficulties. Most notably, there is no definition of the term "internal revenue laws," a new term of art with no legislative antecedent.[46] For example, although proponents of similar proposals have contended in the past that there is a clear distinction between "taxes" (which they believe are "internal revenue") and "user fees" (which they believe are not "internal revenue"),[47] this is a distinction without any meaningful difference in practice. As Richard Darman, Director of the White House Office of Management and Budget under President Reagan, acknowledged, "[i]f it looks like a duck and walks like a duck and quacks like duck, it is a duck, [and] euphemisms like user fees will not fool the public."[48]

Another definitional problem arises from the fact that it is unclear how and when the so-called "de minimis" increase is to be measured, particularly in the context of a $1.5 trillion annual budget.[49] Would we look at a one, five, or 10-year budget window? What if a bill resulted in increased revenues in years one and two, but lower revenues thereafter? It is also unclear when the revenue impact is to be assessed—based on estimates prior to the bill's effective date, or subsequent determinations calculated many years out. Further, if a tax bill was found retroactively to be unconstitu-

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[44] *A Proposed Constitutional Amendment To Require A Two-Thirds Vote to Increase Taxes: Hearing on S.J. Res. 49 Before the Subcomm. on the Constitution, Federalism and Property Rights of the Sen. Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996) (statement of Lloyd Cutler).

[45] *H.J. Res. 41 Markup.* Rep. Jackson Lee offered an amendment that added at the end of the resolution the following: "The requirements of this article do not apply to any bill, resolution, or other legislative measure that imposes an environmental tax, fee, charge, or assessment." The amendment was defeated on a voice vote.

[46] Proponents' arguments that the courts can resolve the meaning of such open-ended terms in the same way they have "equal protection" and "due process" also miss the point. The courts are the most appropriate body to protect such individual rights and liberties from government excesses in these areas. On the other hand, judging the policy value of tax legislation is an inherently political judgment and should not involve the judiciary.

[47] H.R. Rep. No. 50 at 3.

[48] See *Hearing on Nomination of Richard Darman to be the Director of the Office of Management and Budget Before the Senate Comm. on Governmental Affairs*, 101st Cong., 1st Sess. (1989). The amendment's authors allowed for a loophole of potentially massive dimensions when they stated that efforts to adjust the Consumer Price Index—which would reduce indexing for tax brackets—would not constitute a change in "internal revenue." (Transcript at 39 ("under the [revised] language [reducing the CPI] would not [require a two-thirds vote], because that would not be a change to the internal revenue laws.") Under this interpretation, legislation such as that offered by Sen. William Roth (R-DE), Chair of the Senate Finance Committee, reducing CPI adjustments by 1.1% per year—and which Congressional Budget Office estimated would increase income taxes by $22.8 billion per year in 2002 and more than double that by 2006—would not constitute an increase in "internal revenue." See S. 2, 105th Cong., 1st Sess. (1997).

[49] See, e.g., *Concord Coalition Letter* at 1.

tional, the tax refund issues could present insurmountable logistical and budget problems.[50]

All of these ambiguities point to one of the most serious problems inherent in H.J. Res. 41: uncertainty regarding the branch of government vested with responsibility for interpeting and enforcing the amendment's requirements. If H.J. Res. 41 is read to authorize judicial interpretation and enforcement, courts would be drawn into fundamental policy disputes best left to the Congress;[51] on the other hand, if judicial enforcement is unavailable, those seeking redress for improperly-imposed tax increases would be left without a meaningful remedy, undermining the public's faith in the Constitution. Moreover, it is doubtful the public would approve of Congress selecting an unelected official, such as the head of the Congressional Budget Office, to police these matters.

VI. THE MAJORITY FREQUENTLY HAS WAIVED ITS OWN HOUSE RULES REQUIRING A SUPERMAJORITY VOTE TO INCREASE TAXES

The unworkability of H.J. Res. 41 is illustrated by the fact that the Majority frequently has ignored its own House rule preventing tax rate increases from taking effect unless approved by three-fifths of the House.[52] In the 104th Congress, the Majority ignored or waived this three-fifths requirements for tax increases on six separate occasions.[53] As Rep. Charles Stenholm (D-TX) wrote in the Washington Post:

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[50] Jim Miller, Director of the White House Office of Management and Budget under President Reagan, testifying on behalf of the Citizens for a Sound Economy, stated that the "de minimis" requirement should be taken out. See *1997 Judiciary Committee Hearing*.

[51] In the event judicial review is invoked, the proposed tax limitation amendment would raise difficult questions concerning standing. For example, it would be unclear whether a taxpayer whose taxes were raised would be able to show sufficient harm to constitute a "case or controversy" or whether it would be necessary for a Member or a whole House of Congress to bring the legal challenge. See *Balanced Budget Constitutional Amendment: Hearing before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 229 (1995) (statement of Walter Dellinger, Asst. Attorney General, Office of Legal Counsel, U.S. Dep't of Justice). To avoid these complications, Rep. Melvin L. Watt (D-NC) offered an amendment to ensure the courts did not get involved in this political question. The amendment stated: "This article shall not be construed as to give the Judicial Branch any authority except to declare whether the Legislative Branch is in compliance herewith." The Majority rejected it on a party-line vote of 9–16.

[52] House rule XXI 5(c), 104th Cong., 1st Sess. (1995).

[53] On April 5, 1995, during the consideration of H.R. 1215, the Contract with America Tax Relief Act, the House Parliamentarian ruled that the new House rule did not apply to the bill even though H.R. 1215 would have repealed the current 50% exclusion for capital gains from sales of certain small business stock. The net effect of H.R. 1215 was to increase the maximum rate of tax on those gains from 14% (50% inclusion times 28% top rate) to 19.8%. All seem willing to concede now that the ruling was erroneous. Even Speaker Newt Gingrich (R-GA) in a June 27, 1995 letter, responding to an inquiry by Reps. Jim Gibbons (R-NV), Joe Moakley (D-MA), and Richard Gephardt (D-MO), conceded that the ruling did not seem "either satisfactory or overly compelling."

On October 26, 1995, the Republicans waived the House rule for consideration of H.R. 2491, the FY 1996 budget reconciliation bill and its conference report. The bill contained several tax rate increases.

On October 19, 1995, the Republicans waived the House rule for consideration of H.R. 2425, the Medicare Preservation bill (which would have imposed additional taxes on withdrawals from MedicarePlus Medical Savings Accounts and premium increases on high-income Medicare beneficiaries).

On March 28, 1996, the Republicans waived the House rule for consideration of H.R. 3103, the Health Coverage Availability and Affordability bill (imposing additional taxes on withdrawals from Medical Savings Accounts).

On May 22, 1996, the Republicans waived the House rule for consideration of the Small Business Protection Act.

On July 31, 1996, the House rule was waived for the Personal Responsibility and Work Opportunity Reconciliation Act of 1995 (possible increases in the earned income tax credit program).

> [T]he final blow to any hope that the vote [on the supermajority tax requirement] might be for real comes from the dismal adherence Republicans have made to their own internal House rule requiring a three-fifths vote to raise taxes. After much fanfare during the organization of the 104th Congress, the House leadership has waived its own effort to restrain itself in every potential instance except one.[54]

In an attempt to avoid these problems, at the beginning of the 105th Congress, the House rule was significantly narrowed to limit its application to increases in particular tax rates specified under the Internal Revenue Code, rather than tax rate increases generally.[55] Such experiences highlight the unworkability of setting forth special procedural rules concerning tax laws and tax rates and these problems would be greatly compounded in a constitutional context.

CONCLUSION

Few measures demonstrate the Majority's inability to understand issues of real importance to the American people like this tax limitation amendment. Year after year, this amendment is brought to the House floor, and year after year it fails. In the meantime, there has been no congressional action on real issues that affect real people, such as a patients' bill of rights, prescription drug benefits for seniors, or a minimum wage increase. For these reasons, we respectfully dissent.

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[54] Charles Stenholm, *An Amendment Without a Prayer*, Wash. Post, Apr. 15, 1996, at A21.
[55] House rule XXI 5(c), 105th Cong., 1st Sess. (1997).